IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1056 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMC

Versus

DEVJIBHAI KARSANBHAI VADHER

Appearance:

1. Special Civil Application No. 1056 of 1995

Mr. D.C. Raval for MR MR ANAND for Petitioner No. 1

MR Kishorbhai V GADHIA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 03/03/2004

ORAL JUDGEMENT

Heard learned advocate Mr. Raval for the petitioner and Mr. Gadhia for the respondent workman.

In this petition under Article 227 of the Constitution of India, the petitioner Corporation is challenging the legality, validity and propriety of the award made by the Labour Court, Ahmedabad dated 21.1.1993 in Reference (LCA) No. 2428 of 1988 wherein the labour court, Ahmedabad has partly allowed the reference and has also se aside the order of suspension made by the petitioner corporation against the respondent workman dated 4.9.1987 as well as the order of dismissal dated 5.8.1988. Under the said award, the labour court also directed the petitioner corporation to reinstate the respondent workman in service with consequential benefits. The labour court has further clarified that as the orders about back wages for the intervening period were not made, no orders about punishment against the workman have been made by it but cost of Rs.1000.00 was awarded by the labour court against the petitioner and in favour of the workman. After the aforesaid award was made by the labour court, one application being Miscellaneous Application No. 64 of 1993 in Reference No. 2428 of 1988 was filed by the petitioner corporation which was also rejected by the labour court on 9.3.1994.

It was submitted by the learned advocate Mr.D.C. Raval for the petitioner that the reference was made by the machinery under the ID Act, 1947 at the instance of the petitioner against the order of dismissal dated 5.9.1988 and, therefore, the labour court is having jurisdiction only to adjudicate the matter at issue or dispute as to whether the order of dismissal made by the corporation against the workman is legal and valid or not and it cannot travel beyond the terms of reference. No reference was made against the order of suspension. The second contention raised by the learned advocate Mr. Raval on behalf of the petitioner is to the effect that the labour court has committed an error in exercising the powers under section 11A of the ID Act, 1947, in setting aside the order of dismissal as the punishment imposed by the corporation is not disproportionate and/or harsh or unjust. It was also his submission that looking to the gravity of misconduct, the punishment imposed by the corporation is just and proper and, therefore, the labour court is not justified in interfering with such an order of punishment in exercising the power under sec. 11A of the ID Act, 1947. It was also his submission that while exercising the powers under section 11A of the ID Act, 1947, the labour court has also set aside the order of suspension and in doing so, the labour court has erred under sec. 11A of the ID Act and also considering the terms of reference. Except these submissions, no other submissions were made by the learned advocate Mr. Raval

on behalf of the petitioner.

On the other hand, learned advocate Mr. K.V.Gadhia appearing for the respondent workman has submitted that after the award was made by the labour court, the respondent workman was reinstated in service and has served with the corporation and has already retired after completing the age of superannuation on 31st August, 1998. He also submitted that the petitioner has paid all the benefits save and except the benefit of pension. It was his submission that the petitioner has made payment of gratuity amount, PF amount, encashment of earned leave but pension has not been sanctioned. He also submitted that under section 11A of the ID Act, the labour court is having power to reduce or modify the order of punishment if the labour court is of the view that the order of punishment imposed against the workman is harsh and unjustified in the facts of the case, considering the gravity of the misconduct proved against the workman. Thus, according to him, these are the discretionary powers enjoyed by the labour court as per section 11A of the ID Act, 1947. According to him, the labour court has set aside the order of dismissal considering the past clean record of the workman as it was found harsh by the labour court and in doing so, no error has been committed by the labour court. According to him, the labour court, after considering the material produced from both the sides, was satisfied that the punishment imposed upon the workman was the extreme punishment and, therefore, it interfered with the order of punishment and no fault can be found with such exercise of the powers. He also submitted that under section 10(4) of the ID Act, 1947, the labour court is having power to consider and decide the incidental maters and the order of suspension being an incidental matter ultimate out come of which was the order of dismissal, same was set aside by the labour court in exercise of the powers under sec. 10(4) of the ID Act and, therefore, it cannot be said that the labour court has travelled beyond the terms of reference or that it has committed any jurisdictional error. According to his submission, while granting relief of reinstatement, the labour court has clarified that as the orders about back wages for the intervening period were not made, no orders about punishment against the workman have been made and thus, it was his submission that the back wages of the intervening period of about five years were denied by the labour court by way of punishment considering the misconduct which was proved against the workman and thus punishment was imposed against the workman by denying the back wages of about five years and thus, the award made

by the labour court is a balanced award passed while keeping two things that the workman should not remain without work and that the employer should not be made to suffer the burden of back wages for such a long period and, therefore, there is no necessity to interfere with such an award. It was also his submission that since the respondent was reinstated in service and retired also after the award was made, now it would not be proper to disturb such award when the workman has already retired in 1998. Therefore, there is no necessity to interfere with the impugned award in exercise of the powers under Article 227 of the Constitution of India.

I have considered the submissions made by the learned advocates for the parties. I have also perused the impugned award made by the labour court. Before the labour court, statement of claim was filed vide Exh. 5 wherein it was stated by the workman that he was working with the corporation since more than 29 years and was receiving the salary of Rs.1400.00 p.m. at the relevant time. According to him, the departmental inquiry was not properly held against him and the misconduct was not proved in the departmental inquiry and, therefore, order of dismissal was bad. Against the statement of claim filed by the workman, reply was filed by the corporation wherein preliminary point was raised by the corporation that before raising the industrial dispute, the corporation was not approached by the workman and, therefore, reference is bad. It was also alleged that the workman was working as Animal Section Keeper and he was used to come late frequently and intentionally and therefore on 13th July, 1986, his presence was not marked by himself and he had stopped to mark his presence. It was also alleged that he was suggesting the other workmen not to mark their presence and was spoiling the atmosphere. It was also alleged that on 20.8.1987 and 28.8.1987, he had come late and when his explanation was called for, he had misbehaved with his superior officer and he had not obeyed the orders of his superior officer and for that, initially he was placed under suspension by order dated 4.9.1987 during the pendency of the departmental inquiry and on 12th October, 1987, he was served with the charge sheet and after completion of the departmental inquiry, the respondent was dismissed from service. The inquiry officer submitted his findings on 26th February, 1988 and thereafter, the competent authority took decision to dismiss the workman from service and before that, final show cause notice was served upon the workman on 20th April,1988. Reply dated 25th June, 1988 was received and, thereafter, he was dismissed by order dated 5th September, 1988. Before

passing the order of dismissal, during the course of departmental inquiry, reasonable opportunity was given to the workman and there is no breach of principles of natural justice committed by the corporation and, therefore, according to the corporation, the inquiry conducted against workman by the Corporation is legal and valid and no breach of the principles of natural justice has been committed by the corporation. Certain documents were produced by the Corporation vide Exh.9, 9/1 to 9/10 relating to departmental inquiry and, thereafter, the workman was examined vide Exh. 10. Then, the workman filed purshis under section 11A of the ID Act, 1947. As per the purshis filed by the workman, he was not challenging the departmental inquiry initiated against him but was reserving his right to challenge the findings and the quantum of punishment and prayed that the dismissal order is little harsh and unjustified and therefore, he may be reinstated with full back wages. It should be noted that the copy of the said purshis under sec. 11A of the ID Act, 1947 was served upon the corporation but no reply was submitted by the corporation against the said purshis under sec. 11A of the ID Act, 1947.

Thereafter, the labour court examined this issue as to whether the facts of this case would require the exercise of powers under section 11A of the ID Act, 1947 or not. The labour court considered that there was indisciplined behaviour on the part of the workman in not marking his presence in the Register on 13.7.1987 and thereafter, on two occasions namely on 20.8.1987 and 21.8.1987, he was late and when his explanation was called for his coming late, he misbehaved with his superior and disobeyed the directions issued by the superior officer and, therefore, he was dismissed from service after holding the departmental inquiry against him.

It is necessary to observe that the labour court has considered that the purshis under section 11A of the ID Act, 1947 amounts to admission of the misconduct [page 20, internal page 5 of the award that the workman has admitted the misconduct part and the oral evidence was led only for the purpose of back wages for the intervening period. The labour court has thereafter observed that the workman had completed more than 29 years of service prior to his dismissal and his past record was not produced by the petitioner before the labour court. In view of that, inference was drawn by the labour court that since the adverse was not pointed out by the corporation, the past record of the workman

was clean and no misconduct was committed by the workman in past. Therefore, considering his past record wherein nothing adverse was pointed out or produced by the corporation, the labour court observed that non acceptance of the order of suspension cannot be considered as gross misconduct requiring suspension of an employee and then to dismiss such an employee. One decision in case of R.M. Parmar versus G.E. Board, reported in Lab IC 1982 page 1031 was considered by the Labour Court wherein the Division Bench of this Court has considered that while imposing punishment against the workman, certain relevant factors are required to be taken into considered by the disciplinary authority. In view of these facts, the labour court has come to the conclusion that when the workman has completed more than 29 years of service and when his past record was clean, extreme punishment of dismissal for the proved misconduct of misbehaviour with the superior officer and disobeying of the directions issued by the superior officer cannot be considered to be the gross misconduct requiring suspension and extreme punishment of dismissal from service. Based on these considerations and, the labour court ordered for reinstatement of the workman and passed no orders for back wages while observing that since the orders for back wages have not been passed, orders for punishment have also not been passed. These powers were exercised by the labour court under section 11A of the ID Act, 1947, after considering the facts of the present case.

It is true that by filing the purshis under section 11A of the ID Act,1947, the workman admitted the misconduct but ultimately, it is also necessary to consider certain relevant aspects while considering the question of quantum of punishment. While considering the question as to which punishment should be imposed, it is necessary for the disciplinary authority to consider the sociao economic back ground of the workman, his family back ground, past record, length of service and compelling circumstances to commit such misconduct. These were the relevant circumstances required to be taken into consideration by the punishing authority before taking decision about the quantum of punishment. Section 11A of the ID Act, 1947 is giving powers to the labour court to consider as to whether the disciplinary authority is justified in imposing the punishment in question. If the labour court is satisfied that the punishment is unjust or harsh in light of the established misconduct, then, the labour court is having power to pass appropriate order of punishment in exercise of the powers under sec.11A of the ID Act, 1947. Such

satisfaction is giving discretionary powers to the labour court and such discretion was exercised by the labour court on the basis of the facts on record.The misconduct alleged against the workman and proved against him was to the effect that he had not marked his presence from 13th July, 1987and was late twice on 20th August, 1987 and 28th August, 1987 and refused to accept the order of suspension and misbehaved with the superior officer. These misconducts as per the chargesheet were proved but why this incident has taken place, that has not been disclosed or discussed by the Management while passing the impugned order of punishment. Prior to the passing of the order of dismissal, the petitioner completed 29 years of service as Animal Section Keeper and was having clean service record as such. Naturally he may not be having such discipline which is required to be maintained or expected from the workman in comparison to the other officer like Class I or Class II. After all, the respondent was an employee working in lower class who has to work with the animal and, therefore, naturally, he may not be able to maintain such disciplined behaviour which is normally being maintained by the others who have to work with the human being. The apex court has considered such aspects in the matter of Ved Prakash Gupta versus M/s. Delton Cable India (P) Ltd. reported in AIR 1984 SC 914. In the said matter, the apex court considered that when the entire service record is clear, then, mere using of filthy language and to misbehave with the superior officer is not such a gross misconduct requiring extreme punishment of dismissal. In para 13 of the said matter, it was observed by the apex court as under:

> "13. The finding of the Labour Court that the enquiry was fair and proper in the light of its own finding that the enquiry officer failed to summon the necessary witnesses and rejected the request of the appellant for challenging the witnesses could not be stated to be correct. On the merits some witnesses were examined on the side of the management before the Labour Court and they are S.K. Bagga, MW-2, Hira Lal, MW-3, Deep Chand, MW-4 and Laxmi Chand, MW-5 an Accountant of M/s. Gurumukh Dass, MW-2 has deposed about the appellant abusing Durg Singh who according to the appellant was the Secretary of a Labour Union while the appellant and others were trying to canvass membership for a rival trade union. MW-3 and 4 are stated to have corroborated the evidence of MW-2. MW-5 is the only independent witness examined on the side of the management. It is seen from the judgment of

the Labour Court relating to the merits of the case that MW-5 who has deposed about the challans Exts. M-7 and M-8 having been returned to the person who accompanied him from the maintenance department had not supported the management that the appellant abused Durg Singh or any other person within the premises of the factory. It is also seen from the judgment of the Labour Court that though the appellant had produced before the Enquiry officer 5 sheets of papers with the signatures of about 100 workmen of the factory in support of the statement that the appellant had not abused anyone in the factory during the course of his service and the management had produced Exts. M-6, a list of 90 persons before the Enquiry officer, he had not called any of those persons to ascertain the truth regarding the alleged abuse of Durg Singh and S.K. Bagga by the appellant. It is also seen from the judgment of the Labour Court that the appellant has not given a list of the management's witnesses before the commencement of the domestic enquiry. In these circumstances, we are of the opinion that the conclusion of the Labour Court that the Enquiry officer had not acted properly in the proceedings and that he had not given full opportunity to the appellant as required by law does not call for any interference. The charge levelled against the appellant is not a serious one and it is not known-how the charge even if proved would result in any much less total loss of confidence of the management in the appellant as the management would have it in the charge. It was argued in the Labour Court that there was no previous adverse remark against the appellant. There is nothing record to show that any previous adverse remark against the appellant had been taken into consideration by the management for awarding the extreme penalty of dismissal from service to the appellant even if he had in fact abused in filthy language Durg Singh and S.K. Bagga. We are therefore of the opinion that the punishment awarded to the appellant is shockingly disproportionate regard being had to the charge framed against him. We are also of the opinion that no responsible employer would ever impose in like circumstances the punishment of dismissal to the employee and that victimization or unfair labour practice could well be inferred from the conduct of the management in awarding the extreme punishment of dismissal for a flimsy charge of A

> abuse of some worker or officer of the management by the appellant within the premises of the factory. We therefore hold that the termination of the appellant's service is invalid and unsustainable in law, and that he is entitled to reinstatement with full back wages and other benefits including continuity of service. The appeal is allowed accordingly with costs quantified at Rs. 1,000. The writ petition is dismissed without costs."

Similarly, Division Bench of this court has also taken the same view in the matter Union Bank of India versus Kamlesh G. Shah reported in 1998 (1) LLJ page 760. In the said matter, the division bench of this court considering the facts and circumstances of the case, denied the part of the back wages and granted reinstatement in favour of the workman. Here, full back wages for the intervening period were denied by the labour court by way of punishment while granting reinstatement.

Learned advocate Mr. D.C. Raval relied upon and referred to the oral evidence of Mr.Gor before the inquiry officer. He made a mention of para 3 of the reply and submitted that earlier also similar misconducts were committed in past by the respondent workman. As against that, looking to the award, it appears that no such record of the workman was produced by the petitioner before the labour court and in absence of such adverse material, the labour court presumed that there is no bad record of the workman and he is having clean past record of 29 years. According to my opinion, such presumption in absence of the past record is correct. It is also not the case of the corporation that such record was produced by the petitioner before the labour court and yet it was not considered. Such opportunity was available to the corporation to file objections against the purshis under sec. 11A of the ID Act but no such objections were raised nor any past record was produced by it for consideration of the labour court.

Now considering the contention raised by the learned advocate Mr.Raval that the labour court has committed gross error in exercising the powers under sec. 11A of he ID Act,1947 while setting aside the order of suspension, this court is of the view that such powers are vested in the labour court to reduce the punishment or pass appropriate orders once it is satisfied that looking to the gravity of misconduct, punishment is harsh disproportionate unjust or arbitrary and unreasonable.

This is the subjective satisfaction of the labour court. It is not the case of the petitioner that the material produced by it was not considered or examined by the labour court before exercising such powers. Therefore, the labour court is having such powers and has rightly exercised such powers in favour of the workman in the facts and circumstances of the case. As per section 10(4) of the ID Act, labour court is having powers to decide the incidental matter as while adjudicating the main reference. Suspension is the preliminary step which has ultimately resulted into an order of dismissal against the workman and, therefore, naturally, it is incidental matter covered by sec. 10(4) of the ID Act and, therefore, labour court is right in setting aside the same while granting relief in favour of the workman. Therefore, no jurisdictional error has been committed by the labour court.

Further, it is necessary to note that the labour court has denied the back wages for a period of five years which has been considered by the labour court as punishment for the misconduct which has been proved against the workman. The apex court has considered this aspect in case of Jitendra Singh Rathor versus Shri Baidyanath Ayurved Bhavan Ltd. reported in AIR 1984 SC 976 wherein it has been held that where the tribunal/labour court while directing reinstatement withheld payment of half of the back wages keeping in view the proved misconduct of the employee, withholding of half of the back wages in the nature of penalty, in such a case, it could not be said that the relief of reinstatement was being granted on terms of withholding of half of the back wages and, therefore, did not constitute penalty. In para 3 of the said decision, it has been observed by the apex court as under:

"3. While discretion is vested in the Tribunal under this provision and in a given case on the facts established the tribunal can vacate the order of dismissal or discharge and give suitable directions. It is a well settled principle of law that when an order of termination of service is found to be bad and reinstatement is directed, the wronged workman is ordinarily entitled to full back wages unless for any particular reason the whole or a part of it is asked to be withheld. The Tribunal while directing reinstatement and keeping the delinquency in view could withhold payment of a part or the whole of the back wages.In our opinion, the High Court was right in taking the

> view that when payment of back wages either in full or part is withheld, it amounts to a penalty. Withholding of back wages to the extent of half in the facts of the case was, therefore, by way of penalty referable to proved misconduct and that situation could not have been answered by the High Court by saying that the relief of reinstatement was being granted on terms of withholding of half of the back wages and, therefore, did not constitute penalty."

Therefore, considering the peculiar facts of the present case and also considering the observations made by the apex court in aforesaid decision, according to my opinion, looking to the gravity of misconduct proved against the workman, considering his past 29 years' clean record and considering the position of the workman in the establishment of the petitioner corporation, the labour court was right in interfering with the order of dismissal while exercising the powers under sec. 11A of the ID Act and was also right in denying back wages of five years period by way of punishment considering the misconduct committed by the workman and, therefore, according to my opinion, the labour court has not committed any jurisdictional error and/or procedural irregularity requiring interference of this court in exercise of the powers under Article 227 of the Constitution of India. One additional factor is also required to be considered by this court namely after the impugned award, the petitioner corporation reinstated the workman and after his reinstatement, the respondent has already retired from service in the year 1998 as stated earlier. In view of that also, now, it is not proper to interfere with the impugned award. Therefore, there is no substance in this petition and the same is required to be dismissed.

In the result, this petition is dismissed. Rule is discharged. Interim relief, if any, shall stand vacated forthwith. There shall be no order as to costs.

Learned advocate Mr. K.V. Gadhia appearing for the respondent workman submits that the workman has retired in the year 1998 and till this date, he has not received complete benefits from the petitioner and since this court has dismissed the petition, some suitable directions may be issued to the petitioner corporation for making payments of such complete retirement benefits to the respondent workman by implementing the award in question within some reasonable period. Learned advocate Mr. Raval opposed such submission and submitted that no

such directions can be issued in the petition of the corporation.

I have considered the submissions made by the learned advocates for the parties. Considering the fact that the workman who was dismissed in the year 1988 was reinstated by the corporation after the impugned award made by the labour court and he has retired in the year 1998 and because of the pendency of the petition before this court, complete benefits have not been given to him though period of about eight years has gone after his retirement in the year 1998, according to my opinion, it would be just and proper to issue some suitable directions to the corporation to implement the award of the labour court. Accordingly, petitioner Corporation directed to pay all the remaining benefits flowing from the impugned award and which are otherwise available to the workman as if the order of dismissal is not remaining in existence and to pay such benefits to the petitioner with all other consequential benefits within three months from the date of receipt of copy of this order.

(H.K. Rathod,J.)

Vyas